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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellant,

against

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. MCCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor, and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York,

Appellees.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS

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ON APPEAL TO THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS

Appellees, State officers Nelson A. Rockefeller, Louis J. Lefkowitz and Henry Root Stern, Jr., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United

States, move to dismiss the appeal from the order of the statutory three-judge District Court below on the ground that the appeal is not within the jurisdiction of this court.

Opinion Below

The opinion of the statutory court dated March 17, 1967, is reported at 265 F. Supp. 556 (S.D.N.Y.) and appears as appendix A to appellant's jurisdictional statement.

Jurisdiction

Appellant invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1253 and 2101(6).

Statutes Involved

28 U.S.C. 2281

N. Y. CPLR §§ 314, 5201, 6202, 6214

R. 320, R. 3211

Question Presented

Does this Court have jurisdiction to hear a direct appeal pursuant to 28 U.S.C. 1253 where the three-judge Court below properly found that absent any basis for injunctive relief that Court lost all authority and power as a statutory Court?

Statement

This is a direct appeal from an order entered in the United States District Court for the Southern District of New York on March 17, 1967 by a statutory three-judge court which dissolved itself and dismissed the portions of

appellant's complaint seeking injunctive relief, interlocutory and final, against the appellee state officials.

The appellant commenced this action below seeking an interlocutory injunction to restrain the enforcement, operation or execution of Sections 5201, 6202 and Rule 320 of the New York Civil Practice Law and Rules on the ground that these sections, constituting provisions relating to attachment and garnishment of property, as interpreted and applied by the New York Court of Appeals in *Seider* v. *Roth*, 17 N. Y. 2d 111, 216 N. E. 2d 312,* were repugnant to the Fourteenth Amendment to the Constitution of the United States.

On October 26, 1966 the single district judge denied appellant's application for a temporary restraining order but found that since the substantiality of the constitutional claims raised was in doubt, he convened a three-judge court. 28 U.S.C. 2281.

This action commenced by appellant arises out of two underlying negligence actions instituted in the Supreme Court of the State of New York ostensibly in accordance with the procedures ratified by the New York Court of Appeals in *Seider* v. *Roth, supra.*

In *Seider*, a New York resident was injured in a three-car collision in Vermont and brought suit in New York against one Lemiux, a resident of Quebec. Since no basis for personal jurisdiction over Lemiux existed in New York, plaintiff Seider attached the contractual obligations owed to the defendant by his liability insurer, Hartford Accident and Indemnity Company. Hartford, a Connecticut corporation, issued the policy in Canada but does business in New York. On an interlocutory appeal of the trial court's refusal to vacate the warrant of attachment the New York Court of Appeals affirmed.

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* See also *Simpson* v. *Loehmann*, 21 N. Y. 2d 305, —— N. E. 2d ——; *Victor* v. *Lyon Associates*, 21 N. Y. 2d 695, —— N. E. 2d ——.

The New York Court of Appeals concluded that the contractual rights of a non-resident insured defendant under a policy of liability insurance issued by an insurer doing business in New York constitute a "debt" owed to the nonresident insured defendant which is subject to attachment, and when attached, gives the Court *in rem* jurisdiction over the defendant. Such policy required the insurer, among other things, to defend its insured in any automobile negligence action, and if judgment be rendered against the insured, to indemnify him therefor. Thus, the Court observed, as soon as an accident occurs, there is imposed upon the insurer a contractual obligation which should be considered a debt within the meaning of New York Civil Practice Law and Rules, Sections 5201 and 6202.

The underlying *Vaage* negligence action herein involves an automobile accident which occurred on December 31, 1963 in the State of North Carolina. Appellant's insureds are residents of North Carolina, where the policy of automobile liability insurance was issued and the injured plaintiff is a resident of Norway. An order of attachment was issued by the Supreme Court, Queens County upon the interest of appellant's insureds under the policy and the insureds were subsequently served in North Carolina. The insureds instructed appellant that they were unwilling to subject themselves to a trial in New York.*

A similar attachment and levy was effected in the *Monaco* action herein which arose out of an accident occurring in Pennsylvania where appellant's insured resides and where the policy of automobile liability insurance was issued. The injured plaintiffs, the Monacos, are residents of the State of New York.

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* In contradistinction to *Seider* v. *Roth, supra, Simpson* v. *Loehmann, supra, Victor* v. *Lyon Associates, supra* and in the *Monaco* action herein, only in the *Vaage* action were both the plaintiff and the insureds non-residents of New York. On March 6, 1967 the Appellate Division of the New York Supreme Court reversed the New York Supreme Court, Queens County and *vacated* the order of attachment and levy thereunder. *Vaage* v. *Lewis*, —— A. D. 2d —— (2d Dept.).

The statutory Court below held, without entering into any analysis of appellant's contentions on the merits, that since the complaint presented no basis for appellant's request for injunctive relief, there being no state agency or officer before that Court "to be sensibly or effectively enjoined", the three-judge court must be dissolved and the appellant's remaining claims were accordingly left for resolution by a single district judge. 265 F. Supp. 556 at 562-563.

On April 17, 1967 the appellant served and simultaneously filed, notices of appeal from the order below both to this Court and to the United States Court of Appeals for the Second Circuit.

ARGUMENT

Since this case was not one for which a statutory court is prescribed by 28 U.S.C. 2281, no direct appeal lies to this Court.

Title 28 U.S.C. 1253 permits a direct appeal to this Court only if the case was "required . . . to be heard and determined by a district court of three judges." *Moody* v. *Flowers,* 387 U. S. 97, 101; *United States* v. *Georgia Public Service Commission,* 371 U. S. 285, 287. Accordingly the threshold question here is whether the three-judge court below was properly convened. *Moody* v. *Flowers, supra* at 99.

Title 28 U.S.C. 2281 requires the convening of a three-judge court "in any suit for an injunction against state officials on the ground that a state enactment is unconstitutional." *Swift & Co.* v. *Wickham,* 382 U. S. 111, 120. As the Court below properly found, "not even the . . . [appellant] maintain[s] that the Governor, the Superintendent of Insurance or the Attorney General have acted or can act to affect the rights asserted in the complaints before us." 265 F. Supp. 556 at 562. Only the several

sheriffs are seriously alleged in the complaint to be the state officers sought to be enjoined.*

Assuming, without conceding, that the sheriffs here are deemed by this Court to be state officers for the purposes of this action (*Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 93) regard must be made "to the function of the officer who is sought to be restrained." *Spielman Motor Co.* v. *Dodge, supra* at 94; *Gilmore* v. *James*, 274 F. Supp. 75, 84 (N. D. Tex.), *aff'd* 389 U. S. 572.

It is clear, and the Court below properly found, that the sheriffs act simply as ministerial officers in the disputed attachment proceedings and only by virtue of a specific order of a New York Court. See N. Y. CPLR § 6214. Accordingly the Court below held as noted above, that "there is no state agency or officer or Court to be sensibly or effectively enjoined so as to afford the . . . [appellant] the relief for which they pray. 265 F. Supp. 556 at 562-3.

This Court's opinion in *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, supports that conclusion. In *Oklahoma Gas Co.* a direct appeal was taken to this Court from a statutory Court which dismissed the cause, as here, for want of equity jurisdiction. The suit was commenced by Oklahoma Gas Company against Wilson & Company, Inc., the State Corporation Commission and the Attorney General of the State, to enjoin enforcement of the Commission's order. The order was assailed as an infringement of the due process clause and contract clauses of the United States Constitution. As here, the appellants

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* At no point in this action have the Governor, the Superintendent of Insurance or the State Attorney General conceded that they represent the several sheriffs named here as defendants-appellees. Indeed, the Sheriff of New York County was represented by his own counsel below. See *People ex rel. Fallon* v. *Wright*, 150 N. Y. 444, 448, 44 N. E. 1036, holding that the sheriff is generally classified as a local officer although that office is organized under the authority of the State.

requested this Court to sustain the equity jurisdiction of the three-judge court upon the ground that they were without adequate legal remedy to protect themselves from the force of the alleged unconstitutional order of the Commission.

This Court in *Oklahoma Gas Co., supra,* pertinently observed

> "The allegations against appellee officers, it is true, present on their face every prerequisite to three judge action. But when it became apparent, as it did upon the final hearing, that there was never any basis for relief of any sort against the state officers and that the only matter in controversy was the right of Wilson & Company to recover the alleged excess payments for gas, there was no longer any occasion for proceeding under § 266 [Predecessor statute of 28 U.S.C. 2281]." *id.* at 391.

In the same fashion here there is no basis for equitable relief against the sheriffs. As the Court below noted, and as the complaint here reflects, essentially appellant seeks only a declaratory judgment "settling and declaring" the rights and obligations under the appellant's insurance contracts.* 265 F. Supp. 556 at 559. The statutory court accordingly was improperly convened.

Similarly, in *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, this Court found that the requirements of the three-judge court statute "is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." See also *Moody* v. *Flowers,* 387 U. S. 97, 102.

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* *i.e.* a declaratory judgment that appellant is authorized to enter a general appearance in the New York Courts on behalf of its non-resident policyholders; an order enjoining appellant's policyholders from taking any other and independent action in respect to the personal injury claims asserted against them. 265 F. Supp. 556 at 559.

In *Wilentz, supra,* the appellee commenced a suit in equity in the District Court seeking a declaratory decree against the validity of certain provisions of the New Jersey Municipal Finance Commission and an injunction restraining state and municipal officers from acting pursuant to the Commission Act on the ground that contract obligations were unconstitutionally impaired. In particular the complaint in *Wilentz* assailed as unconstitutional those portions of the statute prescribing a stay of suit or execution against any municipality and coterminous school district in which the commission was functioning. The only state officers sought to be enjoined were members of the Commission. The stay prescribed by the statute became effective whenever the state Supreme Court found that the municipality was unable to meet its obligations. This Court critically noted

> "The order of the Supreme Court promulgating its finding is the decisive action which calls the stay provisions into operation, and when that action is taken the statute becomes self-executing. The Commission is thus without power to grant or withhold a stay, and as the form of the decree, already noted, shows, there is no occasion to enjoin action by the Commission as the means of preventing operation of the stay provisions." *Id.* at 580.

In this case, as in *Wilentz,* it is not the state officers whose actions are the effective means of enforcing or executing the challenged statute, but rather a specific order of attachment by a New York Court.*

This Court has on numerous occasions seen fit to describe the three-judge court statute as an extraordinary

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* *Spielman Motor Co.* v. *Dodge, supra,* is not to the contrary. In *Spielman* this Court found that a New York District Attorney although regarded as a local officer was deemed to be a state officer for purposes of the three-judge court statute because as a prosecuting attorney he acts for the entire state and *initiates* proceedings against violators of state statutes. *id.* at 94-95.

procedure and one that is not to be viewed "as a measure of broad social policy to be construed with great liberality but as an enactment technical in the strict sense of the terms and to be applied as such." *Phillips* v. *United States*, 312 U. S. 246, 251. See also *Swift & Co.* v. *Wickham*, 382 U. S. 111, 124. The appellant has by the expedient of simply naming as nominal parties state officers, against whom no equitable relief may be obtained, critically failed to bring this action within the purview of 28 U.S.C. 2281 and accordingly this Court has no jurisdiction to hear this direct appeal.

CONCLUSION

The appellees herein respectfully pray that the appeal from the order below be dismissed.

Dated: New York, New York, March 28, 1968.

Respectfully submitted,

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